Supreme Court, U. S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

No. 75-5366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

ALVA FISHER, PETITIONER

v.

STATE OF MONTANA, EX REL., IN THE MATTER
OF THE ADOPTION OF IVAN FISHER, A
MINOR, BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

HARRY R. SACHSE,
Assistant to the Solicitor General,

GEORGE R. HYDE,
EDWARD J. SHAWAKER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5366

ALVA FISHER, PETITIONER

v.

STATE OF MONTANA, EX REL., IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, A MINOR, BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 20, 1975, inviting the Solicitor General to express the views of the United States in this case concerning State jurisdiction over tribal Indians. In our view, the decision of the Supreme Court of Montana is contrary to this Court's decisions in Williams v. Lee, 358 U.S. 217, and Kennerly v. District Court of Montana, 400 U.S. 423, and interferes with the right of the Northern Cheyenne Tribe to govern itself under the supervision of the United States. The petition should be granted and the judgment reversed.

In August 1974, Leroy and Josephine Runsabove filed a petition for the adoption of Ivan Firecrow, a minor, in the Montana District Court for the Sixteenth Judicial District. The minor, his natural parents, including his mother, Alva Fisher (petitioner) and the Runsabove were residents of the Northern Cheyenne Indian Reservation and enrolled members of the Northern Cheyenne Tribe (Pet. App. A, 17a).[1] The Northern Cheyenne Tribe

---

1/ See also Brief in Opp. 15.

is a federally recognized Indian Tribe incorporated pursuant to the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461 et seq., and has a Constitution approved by the Secretary of the Interior. Article IV, Section 1, of the tribal Constitution grants the Tribal Council the right:

* * * *

> (p) To regulate the domestic relations of members of the Tribe and of nonmembers married into the Tribe.
>
> (q) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution subject to review by the Secretary of the Interior.

* * * *

The State of Montana has never assumed civil or criminal jurisdiction over this reservation under Public Law 280.[2]

The state district court, relying on this Court's decision in Kennerly v. District Court of Montana, supra, 400 U.S. 423, found that in these circumstances it had no jurisdiction over the adoption of the minor unless such jurisdiction was conferred by the Tribe (Pet. App. B, 21-23). The pertinent tribal ordinance, Article III, Section 2, Revised Law and Order Ordinances, provided as follows (Pet. App. B, 22):

> Adoptions.
>
> - The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> * * * *
>
> Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal court shall be recognized.

2/ Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360, as amended by Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U.S.C. 1321 et seq. Respondents admit that the State has not assumed such jurisdiction. See Brief in Opp. 16. See, also, 78 I.D. 24-26.

> On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts.

The district court accordingly certified the following questions to the Appellate Court of the Northern Cheyenne Tribe (Pet. App. B, 24-25):

> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?
>
> 2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions [sic] on the exercise of that jurisdiction?

The Appellate Court of the Northern Cheyenne Tribe, in response to the request, issued an advisory opinion holding that the tribal ordinances give exclusive jurisdiction over adoptions to the Northern Cheyenne Tribal Court if all parties are members of the Tribe residing on the reservation (Pet. App. C, [illegible]). The district court then dismissed the petition for adoption (Pet. App. B, 23-24).

The Supreme Court of the State of Montana, on respondents' petition for supervisory writs, reversed the district court (Pet. App. A, 18-20). It held that the state courts had jurisdiction over adoption of Northern Cheyenne children prior to passage of the Wheeler-Howard Act, under which the Tribe's ordinance was adopted and approved, and that the Tribe could not [illegible] state jurisdiction by enacting a tribal ordinance to the contrary (Pet. App. A, 19).

It further held that Congress had implicitly recognized such state jurisdiction over adoptions by tribal Indians in 25 U.S.C. 372a (Act of July 8, 1940, 54 Stat. 746), which refers to adoptions under state law in connection with Indian probate proceedings (Pet. App. A, 18). Finally it held that to deny the respondents access to the state courts because they are tribal Indians would deny them equal protection of the laws (id. at 20).

1. The Northern Cheyenne Tribe was brought under federal trusteeship by the Treaty of May 10, 1868, 15 Stat. 655. The principle of self-government, subject to regulation by Congress, implicit in the Treaty, was affirmed in the Act of February 28, 1877, 19 Stat. 254, ratifying an agreement with the Tribe. Article 8 of that agreement states:

> The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.

The present Northern Cheyenne Reservation was created by executive orders on November 26, 1884, and March 19, 1900, 1 Kappler 860, and confirmed as the Tribe's property, held in trust by the United States, in the Act of June 3, 1926, 44 Stat. 690.

The Northern Cheyenne Reservation has thus, since its inception, been subject to the jurisdiction of the Northern Cheyenne Tribe and the United States, as is typically the case with Indian reservations, and as indicated above, the State has not obtained jurisdiction over the Reservation under Public Law 280.

In Williams v. Lee, 358 U.S. 217, and Kennerly v. District Court of Montana, 400 U.S. 423, the Court held that state courts had no jurisdiction in civil suits brought against reservation Indians in the absence of a clear grant of jurisdiction by Congress. As the Court said in Williams v. Lee, supra, 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

[illegible] Navajo Tribe v. Iowa, 411 U.S. 145, 148; McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 168.

The Tribe's right to govern the domestic relations of its members residing on the Reservation is near the heart of the Tribe's right to govern itself. 3/ Contrary to the opinion below, it is not dependent upon the Wheeler-Howard Act. Indeed the Navajo Tribe, the jurisdiction of which the Court ruled on in McClanahan v. Arizona State Tax Commission, supra, and Williams v. Lee, supra, did not elect to take advantage of the Act's provisions, and United States v. Quiver, supra, was decided before passage of the Act.

3/ See United States v. Quiver, 241 U.S. 602, 603-604:

> From an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to the tribal customs and laws.

[illegible] ly, in his dissent in DeCoteau v. District County Court, [illegible], 460, n. 8, Mr. Justice Douglas joined by Justices [illegible] and Brennan, stated (on an issue not addressed by the majority):

> The DeCoteau case involves a problem of domestic relations which goes to the heart of tribal self-government. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture.

[illegible] v. Bad Horse, 163 Mont. 445, 517 P. 2d 893, [illegible] Montana Supreme Court stated (517 P. 2d at 895):

> [illegible] are peculiar to Indian culture and tradition and [illegible] administered by tribal officials who understand Indian traditions and divorce customs * * *.

The holding of the Montana Supreme Court that the State, as a matter of law, had jurisdiction over adoptions of the Northern Cheyenne Tribe before the Wheeler-Howard Act (Pet. App. A, 19), is thus incorrect. 4/ However, even if the State exercised such jurisdiction over the Reservation prior to 1934, there is no doubt that Congress, exercising its plenary power over Indian affairs, could and did pre-empt such an exercise of jurisdiction and delegate it to the Tribe through the Wheeler-Howard Act and the Tribe's constitution, approved under the Act. See United States v. Mazurie, 419 U.S. 544, 553-559; Antoine v. Washington, 420 U.S. 194, 204.

2. Contrary to the suggestion of the Montana Supreme Court (Pet. App. A, 19), the Act of July 8, 1940, supra, 25 U.S.C. 372a, does not recognize state jurisdiction over Indian adoptions in the circumstances of this case. That Act provides that "[i]n probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption * * *" unless the adoption was by decree of a state court, by decree of an Indian court, by a written adoption procedure approved by the superintendent of the Indian agency, or by a procedure established by a tribal authority recognized by the Secretary of the Interior." The purpose of the Act was to assure adequate proof of formal

---

4/ The Montana Supreme Court cited two State decisions in support of its holding. State ex rel. Iron Bear v. District Court, 162 Mont. 33[illegible], 512 P. 2d 1292; and Bad Horse v. Bad Horse, 163 Mont. 445, 517 P. 2d 893. Each of these was a divorce case where the tribe involved had explicitly disclaimed divorce jurisdiction over its members and required that divorces be obtained from state courts.

(continued on next page)

adoptions before these are recognized by the Department of the Interior for purposes of probate. See the letter from the Secretary of the Interior in H.R. Rep. No. 1694, 76th Cong. 3d Sess. (1940): "The broad purpose of the bill is to require that there be a written record of each adoption."

The Act, to be sure, assumes that in some instances state court adoption will be recognized in federal Indian probate proceedings. For instance, if Indians living off the Northern [illegible] adopted a child living off the reservation under state law, and later moved onto the reservation, there is no doubt that the state adoption would be recognized by the Secretary. But there is nothing in 25 U.S.C. 372a giving state courts jurisdiction over an Indian adoption where they would not otherwise have it -- as in this case, where all parties are enrolled resident members of the Tribe, and the Tribe has provided its own exclusive means of adoption. Any such grant of jurisdiction to the State would have to be done expressly. Williams v. Lee, supra, 358 U.S. at 221. See also, Antoine v. Washington, supra, 420 U.S. at 199, 200. 5/

5. The Montana Supreme Court also suggested that the respondents would be denied the rights of full citizenship and equal protection of the laws if they could not use state courts

(continued)

[illegible], by contrast, the Tribe explicitly exercises exclusive jurisdiction over domestic relations between enrolled resident members and the defendant has been forced to litigate her case in state court over her protest.

[illegible] respondents argue (Brief in Opp. 17, 18, 19) that the State has [illegible] "civil causes of action" under 28 U.S.C. 1322(c). [illegible] State has obtained jurisdiction [illegible] Court [illegible] (as amended) [illegible] is concerned that no such jurisdiction has been obtained here (Opp. 16).

in their attempt to adopt the minor child (Pet. App. A 20). But the Constitution does not require States to open their courts to adjudicate matters affecting tribal Indians when the relevant federal statutes and treaties provide for exclusive federal or tribal jurisdiction. Otherwise, there could never be such exclusive jurisdiction; yet the Court has recognized that state courts, without a grant of authority by Congress have no jurisdiction over causes of action against Indians (and this is such a case). See Williams v. Lee, supra; Kennerly v. District Court of Montana, supra. 6/ As this Court stated in Morton v. Mancari, 417 U.S. 535, 552:

> Literally everypiece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Here, the exclusive jurisdiction of the Tribal court over adoption is derived from the Tribe's right to govern its own affairs in matters concerning its members. It is "reasonably designed to further the cause of Indian self-government." Morton v. Mancari, supra, 417 U.S. at 554, a purpose expressly recognized by this Court as "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" (id. at 555).

6/ In regard to matters affecting Indian self-government, this Court stated in Kennerly, 400 U.S. at 427, that state courts have no "jurisdiction over civil causes of action by or against Indians arising in Indian country * * *" (emphasis added). See also Ex parte Crow Dog, 109 U.S. 556 upholding the exclusive jurisdiction of tribal courts over certain crimes committed by Indians within Indian country. See also Keeble v. United States, 412 U.S. 205, 209-212.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

GEORGE R. HYDE,
EDWARD J. SHAWAKER,
Attorneys.

DECEMBER 1978.